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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 313

UNITED STATES OF AMERICA, PETITIONER

v.

WILLARD F. VAN PELT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The District Court of the United States for the Southern District of Ohio rendered no opinion. The appeal to the Circuit Court of Appeals for the Sixth Circuit was disposed of by a judgment (R. 17) which recited that the judgment below was affirmed on the authority of the court's opinion upon a prior appeal in the same case, *Van Pelt* v. *United States,* 134 F. 2d) 735.[1]

[1] Since this opinion is not contained in the present record, it is copied in Appendix A (*infra*, pp. 22–23) for the convenience of the Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 1, 1944 (R. 17). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent brought suit for insurance benefits by reason of total permanent disability resulting from syphilis, a disease for which he had first been treated prior to his induction into military service during World War I. The Government defended upon the ground of fraud in that the insurance had been reinstated as a result of false representations denying the existence of prior syphilitic infection and treatment therefor. Section 200, World War Veterans' Act, as worded in 1927, when the reinstatement was effected (*infra*, pp. 3–4), provided that, "for the purposes of this Act," a veteran should be held and taken "to have been in sound condition when examined, accepted, and enrolled for service."

The question is whether the presumption in Section 200 renders immaterial, and therefore not fraudulent, respondent's false representations upon his application for reinstatement of insurance, which were otherwise concededly material and in all other respects fraudulent.

STATUTES AND REGULATIONS INVOLVED

The provision of the statute directly involved was contained in Section 200 of the World War Veterans' Act, as worded from July 2, 1926, to July 3, 1930 (44 Stat. 793).[2] In the following excerpts from that statute we have supplied emphasis to indicate the pertinent provision:

> For death or disability resulting from personal injury suffered or disease contracted in the military or naval service * * * or for an aggravation or recurrence of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered or contracted in, or such recurrence was caused by, the military or naval service * * * the United States shall pay * * * compensation as hereinafter provided * * *. *That for the purposes of this Act every such officer, enlisted man, or other member * * * shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to de-*

[2] The present statutory provisions prescribing benefits for veterans of the first World War are contained in the World War Veterans' Act of June 7, 1924, as amended. This Act repealed the War Risk Insurance Act of October 6, 1917, which prescribed such benefits prior to June 7, 1924. However, many of the provisions of the War Risk Insurance Act were reenacted without substantial change as part of the World War Veterans' Act. The substance of the legislation now contained in Section 200 of the World War Veterans' Act was formerly embodied in Section 300 of the War Risk Insurance Act.

> *fects, disorders, or infirmities made of record * * * at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record: Provided,* That an ex-service man who is shown to have or, if deceased, to have had, prior to January 1, 1925, neuropsychiatric disease and spinal meningitis, an active tuberculosis disease, paralysis agitans, encephalitis lethargica, or amoebic dysentery developing a 10 per centum degree of disability or more * * * shall be presumed to have acquired his disability in such service * * * or to have suffered an aggravation of a preexisting neuropsychiatric disease and spinal meningitis, tuberculosis, paralysis agitans, encephalitis lethargica, or amoebic dysentery in such service * * *.

Prior to July 2, 1926, the words "for the purposes of this section" appeared in lieu of the words "for the purposes of this Act" italicized above (43 Stat. 1304). On July 3, 1930, the words "for the purposes of this section and section 304" were substituted for the words "for the purposes of this Act" (46 Stat. 995).

The application for reinstatement of insurance was made under Veterans' Bureau Regulation No. 138 permitting reinstatement and conversion of lapsed term insurance upon the payment of two premiums—one for the grace period upon the lapsed insurance and one for the month in which

the reinstatement and conversion is effected—provided:

> (b) * * * the applicant is in good health and so states in his application and submits a report of a complete medical examination and such other evidence relative to his physical and mental condition and insurability as may be required by the director and on such forms as the director may prescribe. (Section 4112, Regulation No. 138, Regulations and Procedure, U. S. Veterans' Bureau, p. 175.)

Section 304, World War Veterans' Act, provides another and different type of reinstatement which, while not invoked by respondent, and perhaps inapplicable to the facts of his case, is set out, in pertinent part, because knowledge of it is essential to an understanding of Section 200, World War Veterans' Act, as amended in 1926. Section 304 (38 U. S. C. 515) provides:

> In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement * * * may be approved * * *: Provided, That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: Provided further, That the applicant during his lifetime submits proof satisfactory to the director show-

> ing that he is not totally and permanently disabled. As a condition, however, * * * the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum * * *: Provided further, That where * * *: proof * * * is furnished showing the applicant is unable to pay such premiums * * * the application may be approved, and the amount of unpaid premiums with interest as provided in this section shall be placed as an interest-bearing indebtedness against the insurance * * *. [~~Italic supplied.~~]

STATEMENT

The District Judge entered judgment for respondent on the pleadings, considering himself bound by an earlier decision of the Circuit Court of Appeals for the Sixth Circuit in the same case—*Van Pelt* v. *United States,* 134 F. (2d) 735 (Appendix A, *infra,* pp. 22–23)—rendered under the following circumstances:

A prior trial of the present suit resulted in a verdict and judgment in favor of the Government. Respondent appealed, and the Government, consenting to a new trial, confessed error with respect to the court's charge to the jury upon a point unrelated to the question presented by the present record. The Circuit Court of Appeals

reversed and ordered a new trial, agreeing with the Government's position in its confession of error[3] but holding also that the statutory presumption in Section 200, that veterans shall be held to have been in sound condition at the time of induction into service, rendered immaterial respondent's misrepresentations, in applying for reinstatement of the insurance sued on, regarding his syphilitic infection and treatment therefor prior to his military service.[4]

Under the present record the facts asserted in the pleadings and not denied, and therefore to be regarded as true in testing the validity of the judgment entered on the pleadings, are as follows:

Respondent has been totally permanently disabled since May 9, 1934. His insurance was in force on that date unless invalid because of fraud in its reinstatement. He had permitted a $10,000 policy of yearly renewable term insurance to lapse

[3] The trial court erroneously instructed the jury that respondent was required to prove total permanent disability as of March 1935. The Circuit Court of Appeals in its opinion, although not directly referring to the Government's confession of error, correctly held that "In order to sustain his cause of action under the pleadings and proof, appellant was required to show total permanent disability only subsequent to 1939" (Appendix A, *infra*, p. 33).

[4] Because of its confession of error on an unrelated point and the absence of contention by respondent, the Government did not anticipate a decision on this basis. The point was only briefly touched upon by the Government in connection with a different, although related, contention advanced by respondent.

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on or about July 1, 1919, for failure to pay the agreed premium. He applied for reinstatement of $5,000 of this lapsed insurance on June 29, 1927, and simultaneous conversion of it to the policy of United States Government life insurance sued on. (R. 2, 5–6.) The application for reinstatement, executed upon a prescribed form, contained representations disclosed by the following questions and answers:

> 11. Have you ever been treated for any disease of brain or nerves? *No.* Throat or lungs? *No.* Heart or blood vessels? *No.* Stomach, liver, intestines? *No.* Kidney or bladder? *No.* Genito-urinary organs? *No.* Skin? *No.* Glands? *No.* Ear or eye? *No.* Bones? *No.* (Answer each "Yes" or "No." If "Yes," describe fully and give dates.) (R. 7.)

As part of his application respondent submitted a report of a medical examination by a physician of his own choice and represented to the physician, and through him to the Government, that he had never had syphilis (R. 8). Those representations were false, because respondent had in fact been treated for syphilis in 1915 or 1916, or both of those years. They were made by him with knowledge of their falsity and with the intention to deceive the Government and induce reinstatement of the policy, and they were material and were relied upon by the Government. (R. 8–9.)

Judgment having been entered against it on the pleadings, the Government appealed. The Circuit Court of Appeals entered a judgment affirming the judgment below upon the authority of its opinion on the prior appeal (Appendix A, *infra*, pp. 22–23) (R. 17). The judgment of the Circuit Court of Appeals recognizes that that court was not bound by its own earlier opinion [5] and, although it recites a reconsideration of the merits of the appeal, it contains no discussion of the merits.[6]

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[5] Cf. *Reynolds Spring Co.* v. *L. A. Young Industries*, 101 F. (2d) 257, 259 (C. C. A. 6); *Luminous Unit Co.* v. *Freeman-Sweet Co.*, 3 F. (2d) 577, 580 (C. C. A. 7).

[6] The judgment is principally devoted to a criticism of the Government for not seeking either a rehearing by the Circuit Court of Appeals or review by this Court on certiorari of the decision upon the first appeal (R. 17). Insofar as rehearing is concerned, modification of the prior opinion was not sought because the record then before the court was not deemed an appropriate vehicle to present the point decided. In respect of certiorari, in addition to the state of the record, it should be pointed out that the Government had invited reversal of the judgment in its favor in the district court by its confession of error. Moreover, unlike the present judgment, the prior judgment of the Circuit Court of Appeals was not final, and the record upon which that judgment was based disclosed other issues upon which the case might be finally disposed of upon retrial, rendering unnecessary review by this Court of the question here presented. (Cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258; *American Construction Co.* v. *Jacksonville, T. & K. Ry.*, 148 U. S. 372, 378.) Proceedings in the trial court on remand have eliminated these additional issues except, possibly, that in the event of reversal of the present judgment respondent could deny fraud as a matter of fact. Failure,

In its opinion, upon the first appeal (Appendix A, *infra*, pp. 22–23), the court did not refer to the administrative construction of the statutory provisions involved, the legislative history, or earlier judicial interpretation. It apparently thought that the Government conceded that for the purpose of reinstating insurance under the statute (*i. e.*, under Section 304), the presumption contained in Section 200 prevented inquiry as to preservice illness and treatment and viewed the Government's contention as being that reinstatement under the regulations should be different in this respect because the regulations should not be regarded as covered by the phrase "for the purposes of this Act" (see Appendix A, *infra*, pp. 24–26, 28–30). The court reasoned that the regulations, having been issued pursuant to the authority of the Act, were to be regarded as a part of the Act as truly as the statutory provisions themselves; that, therefore, the effect of the presumption for the purpose of reinstatement under the statute and for reinstatement under the regulations should be the same, with the result that inquiry in the present case, for reinstatement under the regulations, was prevented as to preservice illness and treatment. The court seems to have been motivated by the view that it was merely harmonizing

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of course, to seek review of an erroneous holding prior to final judgment is no impediment to review of the holding after final judgment. *Rogers* v. *Hill*, 289 U. S. 582.

the procedure for reinstatment under the regulations with the procedure which it thought the Government had conceded was applicable for reinstatement under the statute.[7]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, for the purpose of ascertaining whether an applicant for reinstatement of insurance in 1927 was then in good health, the Director of the Veterans' Bureau was without authority to inquire as to the state of the applicant's health prior to his military service.

2. In holding, in effect, that respondent's misrepresentations, otherwise fraudulent, were intended by Congress to be excused.

3. In holding invalid the administrative construction of the presumption in Section 200 regarding the sound condition of veterans at the time of induction into service.

4. In affirming the judgment of the District Court.

[7] However, the Government's concession in the Circuit Court of Appeals, which was in accord with its present position as shown hereinafter (pp. 12, 16–20), was only that the presumption in Section 200 applied to reinstatements under Section 304 for the purpose of establishing service connection of disability, as required by that section, but not for the purpose of preventing inquiry as to preservice illness and treatment for the purpose of determining that the applicant was not totally permanently disabled, also required by Section 304.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals invalidates a procedure under which hundreds of thousands of applications for reinstatement of insurance were acted upon by the Veterans' Administration.[8] It holds directly that inquiries contained in all applications for reinstatement under the regulations between July 2, 1926, and July 3, 1930, were unauthorized insofar as they related to preservice illness and treatment. The decision also rests apparently upon a mistaken assumption that such inquiries have been regarded as unauthorized administratively for the purpose of reinstatements under the statute (*i. e.*, under Section 304) since July 2, 1926.

The Veterans' Administration and its predecessors have consistently for nearly twenty-five years followed the practice, heretofore unquestioned, of obtaining from all applicants for reinstatement of insurance, both under the statute and the regulations, information regarding all past illnesses and treatment in respect of such diseases and disorders as it deemed of consequence in determining the current state of health and insurability of the applicant.[9]

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[8] Thus approximately 245,000 were acted upon in the fiscal year ending June 30, 1928, the year in which the insurance here sued on was reinstated. See *Annual Report of the Director of the United States Veterans' Bureau for 1928*, p. 23.

[9] See letter from the Administrator of Veterans' Affairs (Appendix B, *infra*, pp. 34–36) and the form of application

This Court has steadfastly adhered to the proposition that the construction placed upon statutory provisions by the officials having the duty of administering them will be presumed to be correct and will not be disturbed judicially unless it is clearly wrong. *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209, 214; *United States* v. *Moore*, 95 U. S. 760, 763; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Jackson*, 280 U. S. 183, 193; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Madigan*, 300 U. S. 500, 505; *New York, Chicago & St. Louis R. Co.* v. *Frank*, 314 U. S. 360, 372.

2. The administrative construction is in accord with the legislative history of the provisions in question and gives those provisions the full effect which Congress intended. Moreover, the administrative construction has been approved by Congress in repudiating an inconsistent judicial interpretation, in connection with a different problem, and is supported by judicial rejection of the same inconsistent interpretation. Also, the construction given by the court below achieves an unconscionable discrimination between veterans which hardly could have been intended by Congress.

The presumptions in Section 200 of (1) sound condition at the time of examination, acceptance,

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for reinstatement, Form 742 (Appendix B, *infra*, pp. 37–38), employed by the Administration in the case of all applications for reinstatement, a form which was in use as early as July 1920.

and enrollment for service (directly involved in the present case) and of (2) the service origin of disabilities manifested subsequent to service but prior to January 1, 1925 (not directly involved in the present case but essential to an understanding of the problem presented), were provided by amendatory legislation enacted at different times but for a single purpose. The single purpose was to establish or aid in the establishment of service connection of disabilities which, absent the presumptions, might have been regarded as having been incurred either before or after the period of service. These presumptions were originally specifically restricted to compensation matters, and this restriction was removed only after service connection of disability became significant with respect to insurance as a result of the enactment of the legislation now embodied in Section 304, World War Vetrans' Act, *supra,* pp. 5–6. The single purpose of the presumptions—as an aid to the establishment of the service connection of disabilities—was not altered at any time.

The presumptions were enacted at different times to meet specific problems. The first problem arose in connection with veterans who had been discharged from service for disability, which, although it was declared by the service medical authorities at the time of discharge to have existed prior to enlistment, was not noted upon examination, acceptance, and enrollment for service. Such disability, although manifested in service, was not compensable

under the War Risk Insurance Act of October 6, 1917, until an amendment approved June 25, 1918 (40 Stat. 611), provided that, for the purposes of Section 300 (dealing only with compensation, see footnote 2, *supra,* p. 3), it should be conclusively presumed that the veteran was in sound condition at the time of enlistment.[10]

The second problem which led to an amendment of Section 200 of the Act arose in connection with veterans who, subsequent to service and within a prescribed period, developed disabilities from diseases of a character such as tuberculosis, which might well have originated in service or been aggravated thereby but which could not be proved to have originated therein. Congress accordingly provided a presumption of the service origin or aggravation of tuberculosis and neuropsychiatric disabilities developing a 10 percent degree of disability within two years after separation from service (amendment of August 9, 1921 (42 Stat. 153)), within three years after separation from service (amendment of March 4, 1923 (42 Stat. 1522)), and, finally, at any time prior to January

[10] The legislation under construction in this case originated with this amendment which was offered from the floor of the House and passed without committee consideration. The author of the amendment explained in detail its limited purpose of avoiding the denial of compensation for disability manifested in service upon the ground that it had existed prior thereto (Congressional Record, Vol. 56, Part 7, pp. 6925, 6933).

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1, 1925 (amendment of June 7, 1924 (43 Stat. 615)).

Service connection of disability first became a factor of significance in connection with insurance as the result of an amendment to Section 408, War Risk Insurance Act, on August 9, 1921. As a result of this legislation, later embodied in Section 304, World War Veterans' Act (*supra,* pp. 5–6), it became possible for a disabled person who was not totally permanently disabled to reinstate lapsed Government insurance provided he could show that his disability was due to service.[11]

The original restriction to compensation matters of the presumptions relative to the service origin of disabilities embodied in Section 200 led to the anomalous situation in many cases of disabilities which were deemed to be service connected for the purposes of compensation but not service connected for the purposes of reinstatement of insurance under Section 304, although both benefits depended upon service connection of the disabilities. Section 200 was amended on July 2, 1926, for the sole purpose of eliminating this inconsistency and making possible the reinstatement of insurance

[11] Reinstatement despite service-connected disability required the payment, either in cash or through the imposition of a lien on the proceeds of the policy, of all premiums in arrears, with interest thereon. Consequently reinstatement under the regulations, upon proof of good health and the payment of only two premiums, continued to be the more advantageous method of reinstatement. Prior to 1921 this had been the sole method of reinstatement.

under Section 304 by veterans whose disability was service connected only by reason of the presumptions contained in Section 200.

This 1926 amendment was sought by the Administration. Its purpose and the clear Congressional understanding of it are shown by the following statements of Veterans' Bureau officials before the Senate Committee on Finance on May 24, 1926:

> Mr. ROBERTS. Page 13, line 21, the insertion of the word "Act" instead of "section." At the present time it reads that this presumption is only for the purpose of this section; that is, for the purpose of paying compensation. We also have a provision which permits reinstatment of insurance by men who have service-connected disabilities. This is for the purpose of eliminating the necessity of those men proving service connection under the insurance provisions when their service connection is presumed for compensation purposes.
>
> Senator REED of Pennsylvania. I think it is a consistent thing to do.
>
> General HINES. Section 304 relates to insurance. This Section 200 relates to compensation.
>
> (Hearings before Committee on Finance, U. S. Senate, 69th Cong., 1st Sess., on H. R. 12175, p. 27.)

After the amendment on July 2, 1926, there were court decisions misconstruing the intent of the legislation. The most important of these was

the reported case of *Brandaw* v. *United States*, 35 F. (2d) 181 (C. C. A. 9), holding that upon the issue of total permanent disability under an insurance policy in force during the insured's military service it was error for the trial court to have refused a plaintiff's requested instruction that a veteran is presumed to have been sound at enlistment except for defects then noted, and that a veteran's neuropsychiatric disability must be regarded as originating in service (and not otherwise) if it was manifested to a 10-percent degree prior to July 1, 1925. Promptly after this decision, rendered on October 14, 1929, the Administration recommended, and Congress enacted on July 3, 1930, a further amendment to Section 200 of the Act, to make clear the original restricted intention of the 1926 amendment. This is shown by the following quotation from the report of the Senate Committee upon the bill which was enacted on July 3, 1930:

> Your committee has also changed the phraseology of the first sentence following the misconduct provision as it exists in the present law to clarify the remainder of the section. The word "act" was substituted for the word "section" in the amendment to the World War veterans' act dated July 2, 1926, in order to enable veterans to reinstate insurance under section 304 of the act, and show for that purpose that the disease from which they were suffering at the time of attempted reinstatement was of

> service origin. It was not intended by the change to enable a veteran in a suit on Government insurance to establish for the purposes of the suit that the disability on account of which the same was based was of service origin. Your committee has been informed that certain courts have so construed this section as it reads in the present law. In order to clarify the matter and show clearly the original intent of the Congress, your committee has therefore changed the word "act" to "section and section 304 of this act," on page 15, lines 2 and 3. (Senate Report 885, 71st Cong., 2d Sess., p. 8.)

It is therefore evident that in using the words "for the purposes of this Act" in the 1926 amendment Congress intended only that the presumption of sound condition at the time of enlistment embodied in Section 200 should be applicable in connection with but one other subject matter in addition to that to which the presumption had previously been applied. The presumption had theretofore applied in connection with the establishment of service origin of disability for compensation purposes; it was thereafter to apply also, in connection with service origin of disability, for the purpose of reinstatement of insurance by a disabled veteran under Section 304—but for no other purposes. It is evident that Congress regarded the presumption as affecting only those benefits predicated upon service origin of disability. The only benefit of that character other

than compensation, provided for by Section 200, was the right to reinstate insurance under Section 304. Thus the practical effect of the words "for the purposes of this Act" in the 1926 amendment was only to extend the presumption in aid of service connection for the purposes of Section 304. This congressional intention was fully recognized and stated in *United States* v. *Searls*, 49 F. (2d) 224 (C. C. A. 4). In that case the court said (p. 226):

> The effect, and we think the only effect, of this amendment was to give to the veteran the benefit of the presumption created by section 200 as to service origin of disability, not only in applications for compensation and treatment, but also in applications for reinstatement of lapsed policies.

Moreover, under the construction of Section 200 adopted by the Circuit Court of Appeals, Congress condones an active misrepresentation as a result of which an applicant disabled by preservice syphilis obtained a reinstatement of insurance under regulations and upon conditions requiring that the applicant be in good health. The result is approval, despite such deceit, of a reinstatement upon more advantageous terms than are specified in the Act for an applicant for reinstatement who is disabled by battle-incurred injuries.[12] Congress

[12] A veteran disabled by reason of battle injury could not obtain the advantages of reinstatement under the regulations (*supra*, pp. 4–5); he could not obtain any reinstatement if his

should not be credited with the intention of having made possible such unconscionable discrimination. Such discrimination is plainly no part of "the purposes of this Act"; the Circuit Court of Appeals in the *Searls case, supra,* regarded this limiting language in the statute as being of particular significance (p. 227).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

AUGUST 1944.

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disability was total and permanent, and, in any event, he would be required to pay, or agree to the payment of, all premiums in arrears on his lapsed insurance to obtain reinstatement under the statute (Section 304 of the Act, *supra*, pp. 5–6).

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 9299

WILLARD F. VAN PELT, APPELLANT AND CROSS-APPELLEE

v.

THE UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

Appeal From the District Court of the United States for the Southern District of Ohio, Western Division

Decided April 6, 1943

Before HICKS, ALLEN, and MCALLISTER, Circuit Judges.

MCALLISTER, Circuit Judge. Appellant, Willard F. Van Pelt, brought suit to recover monthly disability payments on a government convertible life insurance policy, and after an adverse verdict and judgment entered thereupon, appealed, claiming error on the part of the trial court in refusing to submit proposed interrogatories to the jury, and for erroneous instructions. Because of our determination of the case, it is unnecessary to consider a cross-appeal filed by appellee.

When appellant entered the armed forces in May 1918 he procured a yearly renewable term insurance policy in the principal sum of $10,000. He permitted the policy to lapse in July, 1919, for nonpayment of a premium. On July 1, 1927, he

procured reinstatement and conversion of the policy to a United States Government convertible term insurance policy, in the principal sum of $5,000. In May of 1934, appellant suffered an attack of general paralysis of the insane, and his guardian applied for disability benefits, which were awarded in October, 1934, by the Insurance Claims Council of the Veterans' Administration. These benefits were paid for a total period of 59 months, until March 1939. Thereafter the Council reviewed the case, found that appellant had procured reinstatement by fraud, and thereupon canceled the policy.

The fraud alleged by the Government, upon which reinstatement of the policy was procured, was that appellant had suffered from syphilis before he joined the armed forces; that he was afflicted with the disease in 1926 and received, at that time, treatments for it from a physician; and that he represented, as a basis for reinstatement of his insurance, that he had never been afflicted with the disease.

It is admitted by appellant that he had syphilis before his enlistment in 1918. However, he claims that he thought that it had been cured, and that he did not know of its active condition prior to reinstatement of his insurance. He insists that he did not receive treatments from a physician for the disease, subsequent to his enlistment, until three years after the insurance was reinstated. Appellant further contends that in his answers as to his physical condition, during his medical examination and for purposes of the medical report, he understood that the questions were di-

rected to cover only the period subsequent to the lapse of his policy in 1919; and that all of his answers, based on this belief, were true. In addition, he contends that the Veterans' Bureau had no right to inquire as to a syphilitic condition existing prior to his enlistment, inasmuch as he was entitled to a conclusive presumption that he was in sound physical condition as of the date of his enlistment; and that instructions to the jury on the question of his alleged total and permanent disability were erroneous.

Briefly, the chief errors alleged are that the trial court held that the Government was entitled to inquire of appellant as to a syphilitic condition existing prior to his enlistment, and refuse reinstatement on proof thereof; that representations of appellant, knowingly made and contrary to the actual fact, that he was not so afflicted prior to such enlistment, would be fraudulent; and that the court erred in refusing to submit special interrogatories to the jury requiring answers to the questions: (1) whether appellant was totally and permanently disabled since January, 1938; and (2) whether he had received medical treatment from the date of lapse of policy to the date of its reinstatement.

In July, 1927, when appellant made application for reinstatement and conversion of policy, such reinstatement was procurable by two methods. Under 44 Stat. 799, see Title 38, § 515, U. S. C. A., where a veteran could not comply with the requirements of the rules and regulations as to physical condition, the application would be approved, provided that the applicant's disability was the result of an injury or disease contracted

in active military or naval service during the World War. However, it was provided that under this section of the statute, the applicant should submit proof satisfactory to the Administrator of Veterans' Affairs, showing that he was not totally and permanently disabled. Furthermore, he was required to pay back all monthly premiums which would have become payable if the insurance had not lapsed, together with interest on each premium from the date it was due by the terms of the policy. If the applicant was unable to pay such premiums, with interest, on a showing to the Administrator of Veterans' Affairs, the application might be approved and the amount of unpaid premiums, with interest, placed as an interest-bearing indebtedness against the insurance.

The second method of securing reinstatement of a lapsed policy was by compliance with the Regulations of the Veterans' Bureau. These Regulations provided that lapsed insurance, in order to be reinstated, required an applicant to tender one premium payment on the term insurance to be reinstated and converted, and one monthly premium on the insurance. In case more than three calendar months had expired from the date on which the unpaid premium was due, the Regulations further provided that, at the time of his application, the veteran should be in good health, and so state in his application; and that he should submit a report of a complete medical examination "and such other evidence relative to his physical and mental condition and insurability as may be required by the Director and on such forms as the Director may prescribe." Sections 4110, 4112,

Regulation 138 of Regulations and Procedure, United States Veterans' Bureau, page 175.

In 1927, at the time of application for reinstatement, § 200 of the World War Veterans' Act, 44 Stat. 793, 38 U. S. C. A. § 471, providing for compensation for death or disability of members of the armed forces who served in the World War, included the following:

> "For the purposes of this Act every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of the active service."

It is admitted by the Government that this conclusive presumption of sound physical condition or health, in addition to being applicable to § 200 of the Act, was also applicable to § 304 of the Act, see Title 38, § 515, U. S. C. A., above mentioned. Appellant did not proceed under the provisions of the statute which permitted reinstatement without complying with requirements as to physical condition. Instead, he filed his application for reinstatement pursuant to the Regulations, which did require medical examination and

the presentation of such other evidence relative to his physical and mental condition and insurability as was required by the Director; and after undergoing such a medical examination, and the filing of a report thereof and the other evidence required as to physical condition, his insurance was reinstated and converted.

In answering the printed questions in the application for reinstatement of insurance, appellant stated that he had never been treated for any disease of the genito-urinary organs; and in reply to a question of the examining physician, he stated that he had never had syphilis. However, he testified that he believed these questions only referred to the period subsequent to default in payment of insurance premium. In support of this claim, he stated that the other printed questions in the application—as to whether he was in as good health as he was *at the due date of the premium in default,* and whether he had been ill or contracted any disease or consulted a physician in regard to his health *since the lapse of the insurance*—led him to this conclusion. He further testified that he had not consulted a physician or received treatments for syphilis prior to the reinstatement of his policy. He explained that certain statements which he had made in 1933, to the effect that he had consulted a Dr. Smith in Hot Springs, Arkansas, and had received such treatments in 1926, were the result of mistake. With regard thereto, he testified that the actual fact was that he had only been in Hot Springs, Arkansas, once in his life, and that the physician he consulted and from whom he received treatments for syphilis

was Dr. Oliver A. Smith, and that the time of such treatments and consultation was in 1930—which was subsequent to his application for reinstatement. His counsel introduced in evidence, a statement of Dr. Smith that he had so treated appellant in 1930. There was no evidence that any treatments had been given him in 1926, except appellant's own allegedly erroneous statement.

Whether he had consulted a physician and received treatments from the time of the lapse of his policy until its reinstatement, was a question of fact for the jury, and as such, was properly submitted by the trial court. Had appellant been treated for the disease subsequent to the lapse of the policy and prior to its reinstatement, such fact would bear upon the question of his good health, which was pertinent in any application for reinstatement. Furthermore, whether appellant misunderstood the questions on the application and believed that they related solely to the period between the lapse of his policy and its reinstatement, or whether he knew that they also included the period before his enlistment and had deliberately misrepresented the facts, would ordinarily be a question for the jury also. But it is unnecessary to resolve this latter issue, as it is our conclusion that no inquiry as to the question of syphilis prior to appellant's enlistment was proper or material.

Statutory provisions in effect at the time when appellant made application for insurance reinstatement (44 Stat. 793), set forth that "for the purposes of this Act" a member of the armed forces was conclusively presumed to be in sound condition at the time of his enlistment. Such presumption applied whether a veteran sought

reinstatement under the express terms of the statute or under the Regulations of the Veterans' Bureau. The making of such Regulations by the Administrator of the Veterans' Bureau was authorized by statute. Title 38, § 426, U. S. C. A. Inasmuch as the statutory presumption was applicable for the purposes of the Act, it was applicable to the Regulations of the Bureau, which were created by virtue of the statute to carry out the purposes of the Act. The fact that the statutory provision as to the presumption was amended in 1930, 46 Stat. 995, and was thereby limited "for the purposes of this section [Title 38, Sec. 471, U. S. C. A.] and section 515 of this title," instead of "for the purposes of this Act," is of no importance in the decision of this case; and we are not called upon to determine whether, under such amendment, the presumption in question would be applicable to the Regulations governing reinstatement of insurance. Appellant's application and the reinstatement, as well as his rights thereunder, are to be judged in the light of the statute as it existed when the transaction took place.

If, therefore, appellant had syphilis before his enlistment, the statute required, nevertheless, that he be conclusively presumed, at such time, in sound condition. A presumption that appellant was in sound condition at the time of his enlistment, obviously, is a presumption that he was not then afflicted with disease. Nevertheless, he had syphilis at that time. Apparently, the disease was in a quiescent state and was not recognized by the Army medical examiner in 1918. But it is a matter of common knowledge that syphilis

pursues its course in a hidden, treacherous way, and that after its first symptoms have disappeared, it often slumbers in the blood stream without further manifestation of its presence during many years, until it suddenly reappears to strike down its unsuspecting victim in disability, insanity, or death.

In the case before us, it appears that, although appellant was treated in 1915 and thought he was cured, the disease continued its unperceived and slow ravages in his body until 19 years later, when its course resulted in insanity. Appellant's present disability results from the continuous disease from which he was suffering at the time of his enlistment. The Government cannot now be heard to say that appellant was afflicted with syphilis at the time of his entry into the armed services and that reinstatement of insurance should be denied because he was then afflicted with the same disease from which he is now suffering. That defense was removed when Congress enacted the statute providing that, for the purposes of the Veterans' Act—which included reinstatement of insurance by virtue of statutory provisions, as well as reinstatement pursuant to Regulations of the Veterans' Bureau as authorized by the Act—a veteran must be conclusively presumed to be in sound health at the time he joined the Army. A requirement that appellant disclose that he was afflicted with syphilis at the time of his enlistment or prior thereto, as a basis for denial of his application for reinstatement, was a violation of the presumption that he was not so afflicted; and this conclusive presumption controls, whether reinstatement be under the express provi-

sions of the statute or under regulations authorized by the Act. The statutory presumption, as it existed in 1927, was conclusive for *all* the purposes of the Act.

But it is contended that the inquiry whether appellant ever had syphilis presented the question of the state of his health as of the date of his application for reinstatement. However, it would present such question only by indicating that he had the same disease on the date of such application as he had at the time of his enlistment; and by the presumption of law enacted for his benefit, he was conclusively held to be in sound health at that time. In this case, it could be said that if appellant had been afflicted with syphilis before his enlistment, he was conclusively presumed to have been cured of such disease and in sound health at the time he enlisted.

Investigation of pre-service syphilis in order to ascertain the present state of appellant's health could only be justified on the ground that he was not cured of the disease at the time of his enlistment and was not then in sound health. Such an inquiry and such an assumption, the statute forbids.

It is not surprising that, in interpreting statutes, anomalies of reasoning may result when a conclusive presumption of a state of facts is directly contrary to the admitted facts. However, as evidenced by the contentions of the representative of the Veterans' Bureau and counsel for appellee during the trial, the actuality of the present situation is, not that the Government complains that it was entitled to know of pre-service syphilis as bearing on the health of appellant at the time

of application for reinstatement, but that it required such information in order to refuse reinstatement if appellant ever had syphilis, whether before or after his enlistment in the Army. It was in accordance with this contention that the trial court instructed the jury that because the Government had such a right, a misrepresentation that appellant never had syphilis was material, and if knowingly made for the purpose of causing the Government to rely thereon, was fraudulent. The attitude of the Veterans' Administration in the present case seems, however, changed from its earlier views, as in 1927, when the reinstatement here in question was granted, it appears from the evidence that it was the policy of the Administration to reinstate in cases where a past history showed syphilis, if, after treatment, the blood test was negative; and the application for reinstatement in the present case required written answers *by the veteran* as to contracting disease, suffering injury, ill health, or consultation with a physician, *only subsequent to the lapse of insurance.*

The Veterans' Bureau had the right, in passing upon the application for reinstatement, to require a physical examination of appellant and a statement from him that he was in good health, as well as information from him as to any consultation with a physican, or any disability, injury, or disease occurring subsequent to enlistment. These requirements were satisfied by appellant. If fraudulent misrepresentations were made as to any of the foregoing, the reinstatement could be canceled; and whether they were so made by appellant was, from our examination of the record, a question for the jury. But it was error to sub-

mit questions as to pre-service syphilis. Any statements made in connection therewith were immaterial, for the Government could not, in law, be misled by them as it could not rely upon them for the purpose of reinstatement.

With regard to the refusal of the trial court to submit proposed written interrogatories to the jury, no error can be predicated thereon, as such submission is discretionary with the court under the rules which control such practice. See Rule 49, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; Moore's Federal Practice, Vol. 3, pages 3095–3098. Other complaints concerning the trial court's instructions as to presumption of fraud and weight of the evidence, are without merit. In order to sustain his cause of action under the pleadings and proof, appellant was required to show total permanent disability only subsequent to 1939.

In accordance with the foregoing, the judgment is reversed, with direction to award appellant a new trial.

APPENDIX B

The administrative practice regarding past syphilitic infection of an applicant for reinstatement of yearly renewable term insurance and the extent of inquiry concerning it are shown by the following letter from the Administrator of Veterans' Affairs and certain documents attached to the letter:

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF
VETERANS' AFFAIRS,
Washington, March 28, 1944.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

MY DEAR MR. SHEA: Consideration has been given to your letter (LPS WCP) in which you state:

> The Circuit Court of Appeals for the Sixth Circuit held in *Van Pelt* v. *United States,* 134 F. (2d) 735, that section 200, World War Veterans' Act, as amended July 2, 1926, prevented inquiry by the Veterans' Administration into illnesses or injuries or treatment for illnesses or injuries antedating the military service of an applicant for reinstatement of yearly renewable term insurance under administrative regulations.
>
> The District Court of the United States for the Southern District of Ohio, in accordance with its interpretation of the

opinion mentioned above, has entered judgment against the United States upon pleadings establishing the falsity and (except insofar as section 200, World War Veterans' Act, as it was worded between July 2, 1926, and July 3, 1930, may be regarded as requiring a contrary conclusion) the materiality of misrepresentations with respect to preservice illness because of syphilis and treatment therefor, made with the intent to deceive, and relied upon by the Government in the issuance of insurance upon an application for reinstatement executed in 1927.

The case is again pending on appeal in the Circuit Court of Appeals, and I believe that it would be helpful to the Court if you would furnish me, in a letter to be incorporated in the Appendix to the Government's brief, a statement of what the administrative interpretation and practice has been with respect to requiring disclosure, by an applicant for reinstatement of insurance, of information concerning illness and treatment antedating entrance into service.

It has been the practice of the Veterans' Administration and its predecessors in the administration of the War Risk Insurance Act, as amended, and of the World War Veterans' Act, as amended, to inquire of any applicant for reinstatement of insurance under the good health requirements of the regulations whether he ever had syphilis or had been treated therefor. I attach for your information a copy of Form 742 (Insurance Division) of the Bureau of War Risk Insurance, Treasury Department, which went into use as early as July 1920, about 24 years ago, and ask attention to question g, "Has applicant ever

had syphilis, gout or rheumatism?" A similar question has been covered in later revisions. The same practice has been followed with respect to applications for reinstatement under Section 304 of the World War Veterans' Act, as amended, or Section 408 of the War Risk Insurance Act, as amended. The presumptions embodied in Section 300 of the War Risk Insurance Act, as amended, and in Section 200 of the World War Veterans' Act, as amended, have not been regarded as affecting such practice.

The purposes of the amendment to Section 200 of the World War Veterans' Act, which was sponsored by the then Veterans' Bureau, have been regarded as limited to authorizing reinstatements of insurance under Section 304 by the persons affected by such presumption, as is indicated by the clarifying amendment to Section 200 of the World War Veterans' Act, 1924, on July 3, 1930.

The alternative to this inquiry as to syphilitic condition in connection with the good health requirements of the regulations, and possibly also as to reinstatement under Section 304 of the World War Veterans' Act, as amended, would have meant a more searching examination with increased expense to the Government and greater inconvenience to the applicants.

For your information I enclose copies of certain material illustrative of the attitude toward inquiries concerning syphilis in connection with the reinstatement of insurance or the granting of insurance initially where good health is a factor. I would ask your attention to paragraph 2 of Circular 367, Adjudication Service, Examinations for Reinstatement of Insurance, June 9, 1926, found in

the printed Regulations and Procedure, U. S. Veterans' Bureau, Part II, page 1684. Circular 419 of the Medical Service, Physical Examinations for Reinstatement of Insurance, March 30, 1927 (in the same compilation at page 1718), is also enclosed, and your attention is asked to paragraph 1 of said circular. On May 23, 1939, the Assistant Administrator requested an expression of medical opinion as to the curability of syphilis, to which a reply was made on May 25, 1939. Copies of the inquiry and reply are likewise enclosed. Finally, a form questionnaire used by the Insurance Division and prepared March 9, 1929, is transmitted at this time, as this questionnaire gives in outline form information requested regarding syphilis where a notation of such condition appeared on an application for reinstatement of lapsed Government insurance.

Very truly yours,

(s) FRANK T. HINES,
Frank T. Hines,
Administrator.

Enclosures.

So far as here pertinent, Form 742, referred to in the foregoing letter, reads as follows:

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE, INSURANCE DIVISION

Form 742—Revised July 1920

REINSTATEMENT APPLICATION FOR TERM INSURANCE

After Discharge From the Military or Naval Service

* * * * *

(f) Have you ever been treated for any disease of the brain or nerves, throat or lungs, heart or blood vessels, stomach, liver, intestines, kidney or bladder, or other genito-urinary organs, skin, bones, glands, ears, or eyes? If yes, state which and describe fully.

* * * * *

(g) Has applicant ever had syphilis, gout, or rheumatism?

* * * * *

(Circular No. 367, Adjudication service)

Examinations for Reinstatement of Insurance

June 9, 1926.

1. When an application is made through the regional office for reinstatement of insurance, term or converted, the examining physician should exercise care and judgment in filling out the forms (742 and 807) and see that all questions are answered as fully as possible. When a disability is found to exist the examining physician should make more than an affirmative answer and furnish sufficient information relative to the condition as to enable central office to determine the insurance risk in the particular case. Reference such as "see the claims file" is of no value, as the claims file is retained in the regional office.

2. If there is a history of syphilis the examiner should state whether or not there are at this time any manifestations of the disease, the date when the last Wassermann test was made and the result. If a tachycardia exists the examiner should give more than the mere pulse rate. The cause of the tachycardia should be stated. Where the urinalysis shows albumin present, microscopical re-

port should be submitted. If at the time of the examination some abnormal or pathological condition is found and the examining physician has some difficulty in making the diagnosis or is of the opinion that the condition may be transitory in nature, the applicant should be reexamined in 24 or 48 hours, where feasible, to check up the findings of the first examination.

3. If sufficient care is exercised in reporting the condition found by the examining physician at the first examination it will relieve the central office of the necessity of requesting reexamination, save time and expense for the Bureau and inconvenience to the applicant.

CHARLES E. MULHEARN,
Assistant Director.

(Regulations & Procedure, United States Veterans' Bureau, page 1684.)

Circular No. 419, referred to in the foregoing letter from the Administrator of Veterans' Affairs, is addressed to the Medical Service, but is in substance the same as Circular No. 367, above addressed to the Adjudication Service.

MAY 23, 1939.

From: Assistant Administrator, H. W. Breining.
To: Assistant Administrator, G. E. Ijams.
Curability of Syphilis.

In consonance with the general practice followed by commercial insurers, the Veterans' Administration does not at this time regard applicants for new insurance or for reinstatement of lapsed insurance, who have a history of syphilis, as in good health from an insurance standpoint

as required by the law and regulations in order to be entitled to such insurance. Such applications accordingly are being disapproved.

The practice of the Veterans' Administration in this regard is based upon the conclusion that at this time pathologic or radical cure of syphilis is still on a basis of theory rather than finally established fact. The Administration has taken the position that until such time as it is definitely proven that syphilis can be completely eradicated, it will adhere to its present procedure.

I am aware of the fact that there exists in the medical profession some difference of opinion as to the curability of syphilis. There may be some developments as to this question which would merit further study at this time.

May I therefore request that the Medical Director advise me whether or not, in his opinion, it can now be definitely proven that syphilis can be completely eradicated.

(S.) HAROLD W. BREINING.

MAY 25, 1939.

ASSISTANT ADMINISTRATOR.

Mr. BREINING, *Assistant Administrator.*

Curability of Syphilis.

The Medical Director, to whom I referred your memorandum of May 23, on the captioned subject, requests me to advise you as follows:

1. He is in accord with the present policy you are following, viz., disapproval of applications for new insurance or reinstatement of lapsed insurance from persons having a history of syphilis. He believes this policy reflects authoritative medical opinion; is justified by the requirement placed

upon you, by law and regulations, to accept only applicants for insurance who are in good health; and is in consonance with the practice of commercial insurers.

2. He further advises that present day medical opinion calls for no change in this policy; and, answering the question in the concluding paragraph of your memorandum of May 23, he is of the opinion that, in the present state of our knowledge, it cannot be stated unqualifiedly that there is proof that syphilis can be completely eradicated.

3. He invites attention to the accompanying copy of a memorandum of October 29, 1934, from the Acting Medical Director to the Director of Insurance, subject—"Insurability of 'cured' cases of syphilis," in which there is a technical discussion of this subject, which it is thought you might wish to review.

Att. (S.) GEORGE E. IJAMS.

DEAR SIR: With reference to your examination of Mr. ———— made in connection with an application for reinstatement of his lapsed U. S. Government Insurance, it is requested that you obtain the following additional information regarding syphilis, which will be treated as confidential.

1. Was there an initial lesion? If so, give date.

2. What were the ensuing symptoms, if any, in order of their occurrence?

(*a*) Sore throat?
(*b*) Rash?
(*c*) Headaches?
(*d*) Pain in bones?
(*e*) Alopecia?
(*f*) Nervous manifestations?

(*g*) Gumma—with date of any symptoms developed.

(*h*) Lesions or scars on tongue or fauces.

3. Was a diagnostic blood examination obtained? Spinal fluid? If so, with what result? How many tests and what intervals?

4. What treatment was employed and continuous duration of same? If intermittent, give approximate dates of employment and intermission.

5. Give the date of final discontinuance of all treatment.

6. Furnish the report of a current Wassermann.

A letter has been written the applicant asking him to call on you at his earliest convenience, in order that you may reexamine him.

The Bureau appreciates your courtesy in furnishing this additional information, the report of which should be forwarded to this Bureau, attention the Insurance Medical Section.

By direction:

H. F. BRALL,
Acting Chief, Insurance Division.

I. D. F. 178. (3–9–29.)

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA,	:	
Petitioner,	:	Case No. 313
-vs-	:	
WILLARD F. VAN PELT,	:	RESPONDENT'S BRIEF
Respondent.	:	

MARSHALL, HARLAN AND MARSHALL
LAWYERS
REISOLD BUILDING
DAYTON, OHIO

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA,	:	
Petitioner,	:	Case No. 313
-vs-	:	
WILLARD F. VAN PELT,	:	RESPONDENT'S BRIEF
Respondent.	:	
	:	

Respondent appears in forma pauperis. He opposes this petition for a writ of certiorari for the following reasons:

I. The decision of the Circuit Court of Appeals below correctly stated the law. (P. 3)

II. The question involved is not one of general interest. (P. 7)

III. The question involved was determined as the law of this case by the Circuit Court of Appeals on April 6, 1943. That decision was not appealed. (P. 8)

IV. The granting of this petition would work an unjustified individual hardship on this respondent. (P. 9)

CASE REVIEW

Respondent's yearly renewable term insurance policy lapsed July 1, 1919. It was reinstated on June 29, 1927. On May 9, 1934 respondent became totally and permanently disabled and applied for insurance benefits. These benefits were granted in October, 1934 by the Insurance Claims Council and were paid until March 9, 1939, when payments were discontinued because of alleged fraud in the procurement of the reinstatement.

In its answer to the respondent's suit the Government alleged:

1. That there was no disagreement between the respondent and the Veterans Administration;

2. That respondent was not totally and permanently disabled;

3. That the respondent had been treated for syphilis in the period between the lapse of the policy and its reinstatement;

4. That the respondent had syphilis before enlisting in the United States Army and had denied the same in his application for reinstatement.

The issues so presented by the Government's Answer were tried in the District Court without a jury, resulting in a judgment for the Government followed by the granting of a new trial. A second trial was had before a jury and a different judge. Under what amounted to a directed verdict the jury found for the Government. The case was appealed to the Circuit Court of Appeals for the Sixth Circuit and counsel for the Government in its brief admitted that error had been committed in the trial below concerning evidence of good health, but the issue as to whether or not the Government was entitled in the application for reinstatement to inquire as to pre-service physical condition was argued thoroughly by both sides and the Court of Appeals determined that the Government in placing such questions in the application for reinstatement did violate the law, and that the answers thereto were therefore not fraudulent. No motion for a rehearing was filed in the Circuit Court of Appeals nor was any appeal attempted to the Supreme Court. The case was remanded to the District Court for a new trial on the three remaining factual issues presented.

In the District Court the Government withdrew all of its factual defenses and set up in its Answer the sole defense that the Court of Appeals had determined to be contrary to law, that is, a denial of pre-service

syphilis in the application for reinstatement. The District Judge granted judgment for plaintiff on the pleadings. The Government appealed and the appellee filed a motion to dismiss the appeal on the ground that the former judgment of the Circuit Court of Appeals determined the law of the case. The Court of Appeals did not expressly pass upon this motion but granted judgment for the appellee in that cause, the respondent herein.

ARGUMENT

I.

There was no error below.

The original yearly renewable term insurance policy taken out by respondent contained no provision allowing reinstatement. Neither was there any specific provision in the original War Risk Insurance Act providing for reinstatement of lapsed policies. However, the Administrator, under his general administrative powers granted reinstatement of lapsed policies in all cases where the veteran could establish his good health at the time of reinstatement.

On August 9, 1921, Section 408 of the War Risk Insurance Act was added.* This addition subsequently became Section 515, Title 38, U.S.C.A. (World War Veterans Act). By this addition the Administrator was authorized to reinstate lapsed insurance policies in the case of disabled veterans, provided such disability was not total and provided it was service connected.

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* 42 Stats., 156

Thus there developed in the Veterans Administration two definite methods of reinstating lapsed insurance policies. One, by virtue of administrative regulations, which might be designated as "good health" reinstatement; the other covered by statute which might be designated as "disability" reinstatement.

On March 5, 1925 Congress amended Section 304 of the World War Veterans Act (Section 515, Title 38, U.S.C.A.) by providing that:

> "No term insurance shall be reinstated after July 2, 1926."*

Thus Congress took from the Veterans Administrator all power to reinstate yearly renewable term insurance either by statute or by his own regulations.

On July 2, 1926, however, the number of reinstatements had been so unsatisfactory that Congress re-authorized the Veterans Administrator to reinstate lapsed insurance policies for one additional year, or until July 2, 192. This grant of power was vested in the Administrator by the last sentence of Section 304, of the Act, which reads:

> "No yearly renewable term insurance shall be reinstated after July 2, 1927."**

In this same Act of July 2, 1926, Congress also amended Section 200 thereof, causing the same to read as follows:

> "That for the purposes of this Act every officer, enlisted man etc., *** shall be conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects, etc., *** made of record*** at the time of *** inception of active service."

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* 43 Stats., 311
** 44 Stats., 790

Prior to this amendment of Section 200, the phrase "for the purposes of this Act" had read "for the purposes of this section". Thus Congress on July 2, 1926 vested in the Veterans Bureau power to reinstate yearly renewable term policies, which power it had theretofore on March 5, 1925 expressly taken away. Thus the extension of this power in the Veterans Administrator most obviously became one of "the purposes" of the Act to the same extent as any other provision of the Act, and when Congress changed the phrase "for the purposes of this section" to "for the purposes of this Act" it stated as clearly as words could express thought that it desired the Administrator, in exercising the newly granted power, to conclusively presume that all veterans seeking such reinstatement were in good health at the time of their enlistment.

With the law itself so unassailably clear we submit that all of that portion of the Government's brief pertaining to hearings before committees and correspondence between officers of the Veterans Administration is wholly immaterial. Such aids to statutory construction are only allowable when the statute itself is not clear.

The Insurance Claims Council of the Veterans Administration itself in October, 1934, definitely decided against the present contentions of the Veterans Administration. At that time Van Pelt made an application for insurance payments because of total and permanent disability. The Insurance Claims Council had before it evidence of Van Pelt's pre-service syphilis and of his medical treatment therefor. It had Van Pelt's Application for reinstatement and his denial in said application of such pre-service syphilis

and it held that such denials did not constitute fraud and authorized payment to Van Pelt. As a result of such finding the Veterans Administration made payments to Van Pelt for a period of almost five years.

This decision of the Insurance Claims Council in October, 1934, is set forth in a report of the Insurance Claims Council dated March 11, 1939 which was in evidence before both the District and Circuit Courts below, and the pertinent portions of which are attached as Appendix "A".

The only direct authority relied upon by the Government is U.S. vs. Searls, 49 F. (2) 224, (See page 20 Petitioner's brief). That was a case in which a veteran sought to recover on an insurance policy and claimed that his disabilities were of service origin. He cited Section 200 of the World War Veterans Act as amended in July, 1926, as authority for the contention that there must be a presumption of pre-service good health in all insurance cases. The District Court below directed a verdict for the veteran on this theory. The Circuit Court of Appeals reversed this directed verdict on the grounds that the presumption of good health applied only to compensation cases and to applications for reinstatement of lapsed insurance policies.

The Government now attempts to read into the Searls decision a statement that the presumption of pre-service good health applied only to "disability" reinstatements and not to "good health" reinstatements, although the authority to grant both types of reinstatement is contained in the same statutory section (Sec. 304). Needless to say, no such distinction was before the Court in the Searls case and no such deduction is at all justified. In fact, we submit that the quoted paragraph of the Searls case is a substantial authority for the contentions of the respondent.

Not only do the statutes clearly sustain the respondent's position and the prior action of the Insurance Claims Council also support the justice of his claim, but the position of the Veterans Administration in this case is wholly untenable in the light of their own regulations.* Section 4112 of The Veterans Bureau Regulations No. 138, adopted July 2, 1926, provides that where insurance policies have lapsed for less than three months they may be reinstated without a medical examination. At the top of the medical portion of Van Pelt's application for insurance reinstatement was printed: "This examination is necessary only when insurance has lapsed for a period of more than three months." The question as to pre-service health is included only in the report of the medical examination of the reinstatement application. Consequently, if Van Pelt's policy had lapsed less than three months, he would never have been asked as to pre-service syphilis; yet the insurance risk of the Government arising out of the pre-service syphilis would be exactly the same whether the lapse was more or less than three months. In fact, there is not the slightest common sense, reason, or justice in attempting to defeat Van Pelt's present insurance claim when no such attempt would have been made if his insurance policy lapse had been less than three months.

II.

The question involved is of no general interest.

The law as laid down by the Circuit Court of Appeals below applies only to yearly renewable term insurance policies which were reinstated between July 2, 1926 and July 2, 1927. It does not apply to any policy converted or

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* See Appendix "B"

reinstated since 1927. The Government's brief on page 12 says that during that year 245,000 policies were acted upon. Out of this group only one policy, that of Van Pelt, raised the question involved in this case. The reinstatement of all such policies after July 2, 1927 is expressly prohibited by statute. Furthermore, there is nothing in the decision below to require the Veterans Administration to change its existing policy. It at least could wait until a second case might arise to get a conflicting Circuit Court decision with that of the Court below before taking the matter to the Supreme Court of the United States.

If only one such case has arisen in the last seventeen years, it is highly questionable that any second case of this kind will ever appear.

III.

The Circuit Court of Appeals below in its first hearing in April, 1943 determined the law of this case so far as the issue before this Court is concerned.

If the Government questioned the finality of that decision for the purposes of certiorari, it could most easily have waived its factual defenses in the Circuit Court of Appeals and made that decision unquestionably final (as it subsequently did in the District Court), and could have filed its petition for certiorari in 1943. The Government was evidently more interested in delay than in getting a prompt determination of this question. The Court of Appeals below in its decision evidently felt that the case should have been disposed of on Appellee's motion to dismiss because of the applicability of the principle of the law of the case, but instead arrived at the same result by passing on the merits so as not to inject an unnecessary issue in the case.

The cases cited by the Petitioner on page 9 of its brief merely set out exceptional conditions under which the law of the case does not apply. They do not conflict with the long series of familiar decisions on this subject applicable to the conditions of the Van Pelt case which we cited to the Court below but will not cite here. Reynolds Spring Co. v. L.A. Young Industries, 101 F. (2) 257, does not apply for the reason that the Court therein expressly stated that the issue before the Circuit Court on its second appellate hearing was a different issue than the one it had determined in its first hearing. It is true that decision did contain a statement that the principle of the law of the case applied only to the District Court, but such statement was not only obiter but, since it makes the "law of the case" synonymous with res adjudicata, was, of course, erroneous.

IV.

The respondent herein has been dragged through litigation for over five years. He has tried this case three times in the District Court and twice in the Circuit Court of Appeals. He is an invalided pauper and for the last six years has been hospitalized. He has always contended that he denied the existence of syphilis in his application for reinstatement because that question was placed in the midst of a number of questions on his application for reinstatement which were all directed exclusively to the period during which his policy lapsed, and he thought that when the Government asked about syphilis, the Government was asking him if he had contracted syphilis during the lapse of the policy. He has always denied any fraudulent intent, yet the Government by every artifice of delay has compelled this respondent to litigate a number of factual issues which never had any more merit than they had the day the

Government finally abandoned them in the third trial of this case before the District Court.

The Government has filed every pleading in this case on the last available day and procured every delay that it could possibly procure. For example, in this present petition there was no record to be printed and the brief was merely an abbreviated summary of the brief used in the Court of Appeals; and yet this petition was not filed until the last available hour.

CONCLUSION

In conclusion we submit that the federal statutes applicable on July 2, 1927 expressly prohibited the Veterans Administration from asking any questions pertaining to Van Pelt's pre-service health; that the Insurance Claims Council in October, 1934, with all of the facts in the Van Pelt case, held exactly as the respondent is contending here; that there is no reason or logic for the Veterans Administration to inquire into pre-service health in the reinstatement of policies lapsed over three months and not to make such inquiry in cases where the policies have lapsed less than three months; that there is no general interest in the question involved in this case; that the law of this case was determined by the Circuit Court of Appeals below on April 6, 1943; and that the granting of this petition would work such a hardship on the respondent as to be wholly disproportionate to any possible gains to be made by a more thorough and costly investigation into this case.

Respectfully submitted,

Attorney for Respondent.

APPENDIX "A"

The pertinent parts of the Report of the Insurance Claims Council, dated March 11th, 1939, reads as follows:

"On the application for reinstatement the veteran stated that he was then in as good health as he was at the date of the premium default, (July, 1918). He denied having been ill, contracted any disease or suffered any injury or been prevented by reason of ill health from attending his usual occupation, or consulted a physician in regard to his health since the lapse of his insurance. He denied having made application for compensation or training allowance. *** He denied ever having been treated for any disease of the genito-urinary organs. *** In answer to question No. 12 on the medical examiner's report — 'Has applicant ever had syphilis, gout or rheumatism?' the examining physician answered, 'No'".

"In a Decision rendered October 22, 1934, the Insurance Claims Council determined that the veteran had been permanently and totally disabled for insurance purposes from May 9, 1934, and that he was incompetent by reason of general paralysis of the insane. *** At the time the award action was taken in this case, the question of fraud was considered. At that time there was no evidence of misrepresentation which would constitute fraud. There was evidence in the Record that the veteran had a history of syphilis dating back to 1915, or 1916; that he had received treatment; that he believed that he was cured, and there was no evidence on record at that time of any treatment or activity of the syphilitic condition between June, 1919 and May of 1934, when the veteran was admitted to the Administration Facility at Lexington, Kentucky."

"At the time his insurance was awarded, there was some evidence in the record that the veteran had had syphilis in 1915, or 1916, prior to his enlistment in the Service, and that he had received treatment over a period of time. His blood was negative and he believed himself to be cured. There was no evidence of any activity of this condition, or that he had consulted a physician between the date of his discharge in June, 1919, up to the time that he entered the Veterans' Administration Facility at Lexington, Kentucky in May, 1934."

APPENDIX "B"

Section 4112 of the Veterans Bureau Regulation No. 138 reads as follows:

"Yearly renewable term insurance which has lapsed or has been canceled may be reinstated or reinstated and converted at any time on or before July 2, 1927, by the applicant making tender of the premiums as required in Sections 4096, 4110, and 4111, and upon compliance with the requirements of this section 4112 and under the following conditions:

(a) Within three calendar months, including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was on the due date of the premium in default and so states in his application.

(b) After the expiration of the period mentioned in clause (a) of this section, provided the applicant is in good health and so states in his application and submits a report of a complete medical examination and such other evidence relative to his physical and mental condition and insurability as may be required by the director and on such forms as the director may prescribe (July 2, 1926)."